IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.08.2006

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THE HONOURABLE MR. JUSTICE K.MOHAN RAM

C.M.A.No.1792 of 1999

The Regional Director
E.S.I.Corporation
143, Sterling Road,
Madras - 34. .. Appellant.

-Vs-

The Management of
Madras Industrial Products,
Rep. by its Partner
46, Velacherry Main Road
Madras - 42. .. Respondent.

APPEAL against order passed by the learned Principal Judge, City Civil Court, Chennai (The Employees' State Insurance Judge, Chennai) dated 24.01.1997 made in E.S.I.O.P.No.34 of 1989.

For Appellant : Mr. G.Desappan.

J U D G E M E N T

The Employees' State Insurance Corporation is the appellant. The challenge is to the judgment and decree dated 24.01.1997 made in E.S.I.O.P.No.34 of 1989. The respondent filed the above Original Petition challenging the order of the appellant passed under Section 45-A of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") in and by which the appellant determined the contribution payable by the respondent at a sum of Rs.2,979.75. The said sum claimed relates to the stipend paid to the so-called apprentices engaged by the respondent herein.

2. Mr.G.Desappan, learned counsel appearing for the appellant submitted that the respondent has not placed any material evidence before the Employees' State Insurance Court (hereinafter referred to as "the E.S.I. Court") to show as to how the respondent was entitled to take four apprentices under the Apprentices Act and the rest under the Standing Orders. He further submitted that the respondent has not let in any oral evidence to establish his case and further submitted that Exs.A-1 and A-2

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are not sufficient to hold that anyone was an apprentice since Ex.A-1 is merely an application and Ex.A-2 is a reply. The learned counsel further submitted that the Court erred in treating Ex.A-4-reply as evidence in the absence of proof of its service on the appellant. He further submitted that the evidence of R.W.1 has not been properly considered and further contended that the ESI Court erred in holding that the Standing Order is also approved by the competent authority, when the same had not been produced before the Court.

3. The following substantial question of law has been framed in the above appeal, namely:-

"Whether the persons concerned are apprentices or employees?"

4. This Court has to consider the issue relating to the claim for contribution on the stipend paid to the apprentices said to have been engaged by the respondent. On this question, the contention raised before me is based on the definition clause as contained in Section 2(9) of the Act. The said Section is relevant, therefore, it has to be necessarily extracted, which reads as under:

> (9)"employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and.....
> (ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
> (iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;
> (and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment; (or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, (52 of 1961) or under the standing orders of the establishment; but does not include)).

5. According to the learned counsel for the appellant, before the ESI Court the respondent marked Ex.A-1 dated 10.02.1987-the application form from one Mr.T.Vedagiri to the respondent, Ex.A-2 dated 10.02.1987-the letter from the respondent to T.Vedagiri, Ex.A-3 dated 04.04.1988-Form C-18 notice from the appellant to the respondent, Ex.A-4 dated 21.04.1988-the letter from the respondent to the appellant and Ex.A-5 dated 08.02.1989-the order passed under Section 45-A of the Act. But no oral

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evidence was let in by the respondent. On the side of the appellant herein, R.W.1-Mr. Govindarajulu was examined and Ex.B-1 dated 13.02.1988-Inspection Report was marked.

6. The learned counsel for the appellant contended that when claim for contribution was made on the wages paid to the so-called apprentices by way of passing an order under Section 45-A of the Act and when the said order was challenged by the respondent, it was the bounden duty of the respondent to establish that all those apprentices who were engaged as apprentices during the relevant period were engaged either as 'apprentices' under the Apprentices Act 1961 or under the Standing Orders applicable to the respondent establishment. It is therefore contended that in the absence of such evidence being placed before the ESI Court, the abrupt conclusion reached by the ESI Court by merely relying upon Exs.A-1, A-2 and A-4 cannot be sustained.

7. A perusal of the order-Ex.A-5 passed under Section 45-A of the Act dated 08.02.1989 shows that the employer-the respondent herein had neither replied nor appeared in person raising objections against the assessment for contribution as per notice dated 04.04.1988 (Ex.A-3). Therefore, the appellant concluded that the employer has no objection to the assessment of contribution as proposed under Ex.A-3. But in the said order, there is absolutely no reference to the contention of the respondent herein that all the 13 persons were apprentices and 4 of whom are apprentices registered under the Apprentices Act and rest apprentices under the Standing Orders applicable to the company. The ESI Court has observed that R.W.1 had no personal knowledge in respect of the work done by the apprentices in the company and it is only on assumption the corporation has taken a stand that the payments made to the apprentices would also attract the contribution. The ESI Court has further observed that the impugned order-Ex.A-5 has been passed on the ground that the respondent herein has not chosen to send any reply for the show cause notice and whereas the respondent had sent a reply under Ex.A-4 dated 21.04.1988 stating that the the apprentices are paid only stipend and they are not employees under Section 2(9) of the Act and the said reply has not been taken note off by the Corporation. The ESI Court has further observed that the Corporation has mechanically passed a cyclostyled order under Section 45-A, as if the petitioner is liable to pay contribution for the amount paid to the apprentices. The ESI Court has further observed that the Standing Order of the company is also proved by the competent authority and when the standing order provides a scheme for apprentices and whatever payments paid to them would not be wages and they are not employees as defined under Section 2(9) of the Act.

8. As rightly contended by the learned counsel for the appellant when it is specifically stated in Ex.A-5-Order that no reply was received from the respondent herein for the show cause notice-Ex.A-3, it is incumbent on the part of the respondent herein to produce necessary proof to show that Ex.A-4-reply was sent by them, whereas no such proof has been filed. In

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the absence of any proof, the ESI Court erred in holding that the respondent herein sent a reply under Ex.A-4 dated 21.04.1988 and further erred in observing that the reply has not been taken note off by the Corporation. The Corporation has mechanically passed a cyclostyled order under Section 45-A and the ESI Court has also failed to keep in mind that the respondent had not adduced any oral evidence to substantiate the pleadings contained in the petition as well as the plea that reply was sent to Ex.A-3. In the absence of oral evidence and in the absence of the production of the certified standing orders and the necessary records to show that the concerned persons were only taken as apprentices under the certified standing orders of the company, the lower Court ought not to have accepted the case of the respondent herein on mere assumptions. When the respondent has not produced the standing order, it is not known as to how the ESI Court has come to a conclusion that the standing order provides a scheme for apprentices. Even if a scheme is there, the respondent ought to have produced acceptable evidence to show that the persons concerned are apprentices appointed either under the Act or under the scheme provided for in the certified standing orders. It has to be pointed out that from the documents produced, namely Ex.A-1 to A-5, it cannot be concluded that the persons concerned were engaged as apprentices and such apprentices were all governed by the certified standing orders applicable to the respondent.

9. In such circumstances, this Court is of the considered view that while setting aside the order of the ESI Court impugned in this appeal, an opportunity should be extended to the parties to place necessary materials before the ESI Court in order to find out as to whether the so-called 'apprentices' said to have been engaged by the respondent would fall within the excluded category as mentioned under Section 2(9) of the Act. I am therefore obliged to remit the matter back to the ESI Court for a fresh disposal in so far as it relate to the issue relating to stipend paid to apprentices. On remittance to the ESI Court both the appellant and the respondent will be at liberty to let in necessary evidence in support of their stand and work out their remedies. The appeal stands allowed as directed above. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Principal Judge,
(The Employees' State Insurance Judge, Chennai)
City Civil Court, Chennai.

2. The Record Keeper,
V.R.Section,
High Court, Madras.

C.M.A.No.1792 of 1999

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